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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Petitioners

v.

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,

Respondents

BRIEF *AMICUS CURIAE* FOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK AND THE COMMONWEALTH OF KENTUCKY PUBLIC SERVICE COMMISSION IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

IN SUPPORT OF AFFIRMANCE

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INTEREST OF THE PUBLIC SERVICE COMMISSION OF STATE OF NEW YORK AND THE COMMONWEALTH OF KENTUCKY PUBLIC SERVICE COMMISSION

The Public Service Commission of the State of New York and the Commonwealth of Kentucky Public Service Commission are regulatory bodies having jurisdiction over

the sale at retail of natural gas in the State of New York and the Commonwealth of Kentucky respectively. An integral component of the retail price of this gas, which has assumed a predominate importance in recent years, is the cost to pipelines for gas purchased from producers, and re-sold to distributors for ultimate consumption in New York and Kentucky. As the FERC's petition for certiorari makes clear, this case involves in excess of $1 billion in such cost nationwide, and comes at a time when natural gas is so costly in many areas as to be non-competitive with alternate fuels. Consequently, the two state commissions have a substantial interest in the outcome of this proceeding on behalf of natural gas consumers and distributors within their respective jurisdictions.

SUMMARY OF ARGUMENT

The two basic arguments advanced by the petitioners for the grant of certiorari are wholly without merit. First, under the decisions of this Court, the court of appeals was required to test independently the consistency of the challenged regulation with the language, structure and purposes of the Natural Gas Policy Act. In so doing, the court accorded the Commission's construction of the statute an appropriate degree of respect. Greater deference was not warranted because the underlying factors justifying such deference in other cases—such as the agency's use of its technical expertise in construing the statute, or the existence of a longstanding agency interpretation implicity approved by Congress—are absent here. Second, the Commission's authority under § 501 of the Natural Gas Policy Act to

define technical terms used in that statute cannot shield the challenged regulation from judicial review. The Commission's authority under § 501 is no more expansive than the identical power the Commission has long held under the Natural Gas Act, which has never been construed in the manner the petitioners now seek. Further, the § 501 claim was not presented to the court of appeals.

ARGUMENT

I. The Petitioners Have Failed To Show That The Court Of Appeals Erred In Any Manner In Vacating The Commission's Regulation, And Review By This Court Is Therefore Not Warranted.

In their petitions to this Court, the Federal Energy Regulatory Commission ("the Commission") and Exxon Corporation, *et al.* ("the Producers") have presented two basic arguments in support of this Court's granting certiorari to review the court of appeals' decision vacating the Commission's "dry rule" method for measuring the energy content of natural gas. First, petitioners claim that the court of appeals gave insufficient deference to the interpretation placed on the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ *3301 et seq.*, by the Commission, the agency charged with the administration and enforcement of the statute, and instead substituted the court's judgment for that of the Commission. Second, they argue that the court of appeals erred in not recognizing that the interpretation of the NGPA, as expressed in the challenged regulation, was committed to the Commission's discretion, by virtue of the rulemaking authority conferred upon the agency in section 501 of the NGPA to define technical terms used in the statute. New York submits that neither of these contentions has merit and the petitioners have failed to offer any "special and important reasons" (Rule 17.1, Sup. Ct. Rev. Rules) why this Court should grant certiorari.

The petitioners' plea for greater deference to the judgment of the Commission overlooks this Court's oft-repeated admonition that "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia..." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). As this Court has explained,

> ...the courts are the final authorities on issues of statutory construction...and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."

Volkswagenwerk Aktiengesellschaft v. *FMC*, *390 U.S. 261, 272 (1968)*.

Thus, the court of appeals simply made the inquiry that it was required to make under the circumstances presented, *i.e.* to determine whether the Commission's construction of the NGPA, as manifested in the challenged regulation, was "inconsistent with the statutory mandate [or would] frustrate the policy that Congress sought to implement." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). The court thus tested the regulation against the NGPA's language, structure, and legislative history, and properly concluded that the Commission's rule is "fundamentally at odds with the Btu measurement technique implicit in the NGPA." 716 F.2d at 15.

Although the court of appeals did grant the Commission's construction of the statute the "respect traditionally due" an agency's interpretation (*Id.*) it correctly declined to accord it the virtually controlling significance that the petitioners now claim it deserves, for there is simply no basis for such deference in this case. Thus, for example, the court noted

that the Commission's "technical experience with measuring Btu's is of limited usefulness in determining what Congress meant" in setting ceiling prices for natural gas on a Btu basis. *Id.* The Commission has made no attempt to refute this finding in its petition to this Court.

Similarly, the Commission's rule is not entitled to deference as a consistent and contemporaneous construction of the statute. On the contrary, the Commission's *initial* "contemporaneous" interpretation of the statute, as expressed in the interim rule published when the NGPA became effective, 18 C.F.R. § 270.204 (1978), 43 Fed. Reg. 56,448 (1978), was understood by both producers and consumers to continue the Commission's *prior* policy of requiring the energy content of natural gas to be measured on a standardized, saturated basis. See 716 F.2d at 6-7. The subsequent "permanent" rule which the court of appeals vacated, on the other hand, is a recent and radical departure from this long-standing policy.

Nor is the challenged rule entitled to respect as a longstanding interpretation which has received the implicit approval of Congress. The Commission does not claim to have advised the Congress with respect to the method of measuring Btu's during the drafting of the NGPA or to have received any indication that Congress was even aware of, much less approved, the Commission's present "interpretation". In sum, the underlying factors which appropriately have led courts to accord a high degree of deference to

administrative agencies in other cases[1] are simply not present here, and such deference is therefore unwarranted.

Finally, the petitioners' claim that the court of appeals disregarded the Commission's authority under § 501 of the NGPA is wholly without merit. There is not the slightest indication in the language or legislative history of the NGPA that §501 is intended to give the Commission the "ultimate discretion" (Commission Petition at 18) to adopt substantive rules free from judicial review.[2] Indeed, the language relied on by the petitioners in § 501 is verbatim the

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[1]See, *e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977), where the Court observed that:

> [v]arying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise.

See also *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969):

> [judicial deference to an agency's construction of the statute] is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings.

[2]As this Court has observed,

> It is now well settled that "judicial review of a final agency action by aggrieved persons will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."... The reviewing court must determine whether "Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.

Morris v. *Gressette*, 432 U.S. 491, 501 (1977). The Commission has offered no basis for concluding that Congress intended such a result here.

same as that which appears in § 16 of the Natural Gas Act (NGA), 15 U.S.C. § 717o, which has never been held to shield the Commission's regulations under that Act from judicial review in the manner the Commission is apparently now seeking. See, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256, (D.C. Cir. 1971) *cert. denied*, 406 U.S. 976 (1972) (reversing the Commission's interpretation of the term "sale...for resale" in § 2(6) of the NGA with respect to royalty provisions of oil and gas leases); *Henry* v. *FPC*, 513 F.2d 395 (D.C. Cir. 1975) (affirming the Commission's construction of the term "natural gas" in § 2(5) of the NGA with respect to synthetic gas produced from coal).

Further, the petitioners' claim of error by the court of appeals on this point is most curious, since neither the Commission nor the Producers made *any* reference to § 501 in their briefs below. On the contrary, the Commission conceded that it was given "no independent authority under the NGPA to define 'Btu'", see 716 F.2d at 15. The petitioners' belated resort to § 501 at this time, in apparent contradiction to their position before the court of appeals, illustrates the shifting and uncertain nature of their defense of the Commission's regulation, and certainly is not a basis for granting plenary review of the decision below.

CONCLUSION

The petitioners have failed to demonstrate that the court of appeals erred in any manner in vacating the Commission's regulations or that review of the case is otherwise warranted by this Court. Indeed, to allow the Commission's "dry rule" to stand would reward natural gas producers with a windfall of enormous proportions *beyond*

the Congressionally-established price ceilings, which, as has been noted, "already took into account the conflicting interests of producers and consumers." *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). The petitions for a writ of certiorari should be denied.

Respectfully submitted,

THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

THE COMMONWEALTH OF KENTUCKY PUBLIC SERVICE COMMISSION

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